89-5809

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of Caldwell v. Mississippi, which condemns false and misleading prosecutorial arguments to a capital sentencing jury concerning the jurors' responsibility as the final arbiters of death, should be applied retroactively:

a) on the grounds that at the time Caldwell was decided it did not create a "new" rule under the standards of Teague v. Lane and Penry v. Lynaugh,

b) or on the grounds that Caldwell rights belong in the category of fundamental fairness rights that enjoy a special exemption from the non-retroactivity rule of Teague v. Lane,

c) or on both of these grounds?

II. Whether the petitioner should be granted a new sentencing hearing on the grounds that his Eighth Amendment rights were violated because the prosecutor made false and misleading arguments to his capital sentencing jury concerning the jurors' responsibility as the final arbiters of death?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Robert Sawyer, and Robert H. Butler, Sr., Warden of the Louisiana State Penitentiary. After the decision below was rendered on August 15, 1989, Warden Butler resigned his position, and Larry Smith was appointed Interim Warden. Therefore, Interim Warden Smith is named as the respondent in this petition for certiorari by Robert Sawyer.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Robert Sawyer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the proceeding of Sawyer v. Butler on August 15, 1989.

OPINIONS BELOW

The En Banc opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the Appendix to this petition, which is bound separately. The opinion of the panel that was vacated in part by the En Banc Court is reported at 848 F.2d 582 (5th Cir. 1988), and is also reprinted in the Appendix.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana (Mentz, D.J.) has not been reported. The District Court adopted, with modifications, the Magistrate's Findings and Recommendations, which are not reported. Both the District Court opinion and the Magistrate's opinion are reprinted in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, after argument En Banc, was entered on August 15, 1989, affirming the District Court's denial of Robert Sawyer's petition for relief from his conviction, and affirming the District Court's denial of his petition to vacate his death sentence and remand for a new capital sentencing hearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment, which provides in relevant part:

> **Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.**

This case also involves the Fourteenth Amendment, which provides in relevant part:

> **. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.**

This case also involves the following Louisiana statutes, which are reprinted in the Appendix:

Louisiana Code of Criminal Procedure, Article 905.8

Louisiana Code of Criminal Procedure, Article 905.9

Louisiana Supreme Court Rule 28

STATEMENT OF THE CASE

Robert Sawyer was represented at his trial for first degree murder by an attorney who was unqualified under Louisiana statutory law to defend death penalty cases, and who received $1,000 for his work. (Habeas Transcript at 114-115, 143.) Robert Sawyer's claims of incompetent representation concerning the work of his counsel at the trial and sentencing hearing are described in the panel opinion. See Sawyer v. Butler, 848 F.2d 582, 588-593 (5th Cir. 1988). Before trial, Robert Sawyer was offered a plea bargain that would have allowed him to plead guilty to murder and to receive a mandatory life sentence, but he declined the plea. (Habeas Tr. at 15.) His co-defendant, Charles Lane, was prosecuted for first degree murder in a separate trial by the same prosecutor who later prosecuted Robert Sawyer. Charles Lane was convicted, and he received a life sentence from his capital sentencing jury. (Trial Transcript at 985-986, A-48-49.)

At the guilt phase of Robert Sawyer's trial for first degree murder, the prosecutor made a closing argument, and defense counsel then stood silent, waving his closing. After the jury returned a guilty verdict on the capital charge, the sentencing hearing was convened, and the presentation of witnesses lasted a little over an hour. (Trial Tr. at 980, A-43.) The prosecutor then gave his closing argument, going first, ahead of defense counsel. The complete text of the closing arguments at the sentencing hearing is reprinted in the Appendix. The prosecutor's arguments included the following statements:

> [Following a discussion about the statutory death penalty factors that the prosecutor was presenting to the jury for its consideration:]
>
> That will be a question of fact for the jury to decide. The law provides that if you find one of these aggravating circumstances then what you are doing as a jury, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and

> evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation . . . . (Trial Tr. at 982, A-45.) (emphasis added)
>
> [Following an argument about how the defendant is to blame for his own situation:]
>
> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and the impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. (Trial Tr. at 984, A-47.) (emphasis added)
>
> [Following a discussion about how the evidence relates to the statutory factors required for the death penalty:]
>
> . . . I think you will decide that there are at least three or four aggravating circumstances which you could reasonably impose in order to justify a death penalty verdict. It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions . . . . (Trial Tr. at 985, A-48.) (emphasis added)

Following the prosecutor's closing argument, the defense counsel responded with a one-page closing. (Trial Tr. at 985-986, A-48-49.) The prosecutor then returned to make a second closing argument, and stated in conclusion:

> [Following an argument about how Robert Sawyer should receive the death penalty even though his co-defendant, who was tried separately, received a life sentence:]

> There is only one verdict that can be rendered in this case and there will be a strong symbolism related to that penalty. You the people are part of the criminal justice system. You now know how it works. Now is the time and I ask you that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend the death penalty. (Trial Tr. at 989-990, A-52-53.) (emphasis added)

The jury then received its instructions, and after deliberations returned a sentence of death, on September 19, 1980. This death sentence was binding on the trial court under Louisiana law. See La. Code Crim. P., Art. 905.8.

Robert Sawyer was represented on appeal by different counsel, and after his conviction and sentence were affirmed by the Louisiana Supreme Court, present counsel entered the case and filed a petition for certiorari. This Court summarily vacated the judgment of the Louisiana Supreme Court, and remanded with instructions for that court to reconsider its ruling in light of Zant v. Stephens, 462 U.S. 862 (1983). See State v. Sawyer, 422 So.2d 95 (La. 1982), vacated and remanded, 463 U.S. 1223 (1983). On remand, the Louisiana Supreme Court affirmed the conviction and sentence, and Robert Sawyer's conviction became final on April 2, 1984. See Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983), cert. denied, 466 U.S. 931 (1984). On May 8, 1984, Robert Sawyer filed a state habeas corpus petition, which included twenty claims. Among them was a claim that was soon to be known as a "Caldwell" claim, namely that Robert Sawyer's Eighth and Fourteenth Amendment rights were violated because the prosecutor's sentencing phase argument injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence. (State Habeas Petition, Claim V, at 12.) The state trial court denied the petition on the same day it was filed, without opinion. On appeal, the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The trial court denied the petition again at the close of the hearing, without opinion. The Louisiana Supreme

Court affirmed the trial court's ruling, 4-3, without opinion. See Sawyer v. Maggio, 479 So.2d 360, reconsideration denied, 480 So.2d 313 (La. 1985).

Having exhausted his state remedies, Robert Sawyer filed a federal habeas corpus petition, with eighteen claims, on January 20, 1986. The district court judge assigned the petition to a magistrate, who rejected all the claims in an unpublished opinion of "Findings and Recommendations." (A-91-140.) In federal court, Robert Sawyer's Eighth Amendment claim concerning false and misleading prosecutorial argument about the jury's role as a final arbiter of death was labelled a "Caldwell" claim. See Caldwell v. Mississippi, 472 U.S. 320 (1985) (decided on June 11, 1985). While the magistrate found that the prosecutor's arguments "dangerously approach[ed] reversible error," he also found that the "standard to be employed in determining whether prejudice resulted" from the arguments "is the 'reasonable probability' test for determining prejudice established by Strickland v. Washington [466 U.S. 668 (1984)]," which was not satisfied. (Magistrate's Findings at 33, 36, A-123, 126.) Judge Mentz affirmed the magistrate's findings and recommendations in an unpublished order, and granted Robert Sawyer's request for a certificate of probable cause to appeal. See Sawyer v. Butler, 848 F.2d at 586-587.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision denying relief. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). The panel rejected Robert Sawyer's claims of ineffective assistance of counsel and denial of due process and equal protection from his representation by a trial attorney unqualified to represent capital defendants under state law. The panel divided over the resolution of the Caldwell claim, with the majority rejecting the claim on the grounds, among others, that Caldwell's "no effect" test should not be applied. See Sawyer, 848 F.2d at 599 n.15. Judge King dissented, and would have vacated the sentence and granted a new sentencing hearing because she found the Caldwell claim was valid. Sawyer, id. at 599-606. The

Court of Appeals granted rehearing En Banc on August 25, 1988, to consider the question whether Caldwell was violated in Robert Sawyer's case. Sawyer, 848 F.2d at 606.

After oral argument in the case, the En Banc Court requested supplemental briefs from counsel on March 30, 1989, concerning three questions arising from this Court's decision in Teague v. Lane, 109 S. Ct. 1060 (1989). (See Letter in Appendix at A-41-42.) One of these questions, "Does Teague apply to collateral attacks upon a sentencing proceeding in a capital case?", was answered in the affirmative by this Court, one month after supplemental briefs were submitted to the En Banc Court. See Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989). The other two issues remain questions of first impression in this Court's jurisprudence: "Does Caldwell articulate a rule that is new within the meaning of the Teague test?" and "Does Caldwell announce a rule that falls within the fundamental fairness exception to the Teague rule?"

The En Banc Court issued its opinion on August 15, 1989, and divided sharply over these two Teague issues. Judge Higginbotham wrote for a majority of nine judges who found that Caldwell is "new" law and does not fall within Teague's fundamental fairness exception to its rule of non-retroactivity, so that Robert Sawyer's Caldwell claim is barred by Teague. Sawyer v. Butler, No. 87-3274, slip op. at 5528 (5th Cir. Aug. 15, 1989) (A-1-27). Judge King authored a dissent for five judges who would have found that Caldwell should be applied retroactively to Robert Sawyer's case, both on the grounds that it was not "new" law at the time it was decided, and on the grounds that Caldwell falls within Teague's fundamental fairness exception. Sawyer, slip op. at 5554-5567 (A-27-40). Judge King noted that if Robert Sawyer's case had been decided "on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted . . . the majority opinion would have granted him a new sentencing hearing." Id. at 5567 (A-40). Judge Rubin expressed his concurrence with the views of the dissent, but did not vote. Sawyer, slip op. at 5530 n.1 (A-3).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S REFUSAL TO APPLY CALDWELL v. MISSISSIPPI RETROACTIVELY IS BASED ON ERRONEOUS INTERPRETATIONS OF THE STANDARDS FOR "NEW" LAW CLAIMS AND CLAIMS RELATED TO "FUNDAMENTAL FAIRNESS" ESTABLISHED IN PENRY v. LYNAUGH AND TEAGUE v. LANE. UNLESS REVERSED, THE FIFTH CIRCUIT'S RULING WILL CREATE BROAD NON-RETROACTIVITY DOCTRINE THAT WILL BAR DEATH ROW DEFENDANTS FROM RECEIVING HABEAS CORPUS RELIEF BASED ON MERITORIOUS EIGHTH AMENDMENT CLAIMS.

In Robert Sawyer's case, a sharply divided Fifth Circuit En Banc Court disagreed over the meaning of this Court's definition of "new" death penalty decisions that are not retroactive under Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The majority held that the Supreme Court made "new" law when it condemned a prosecutor's false and misleading argument about the non-finality of a jury's death verdict in Caldwell v. Mississippi, 472 U.S. 320 (1985). The Fifth Circuit's decision should be reviewed by this Court because the majority expressed the need for guidance on this question, and because Sawyer creates a blueprint for "new" rules that conflicts in several respects with the retroactivity standards established by this Court in Penry and in Teague v. Lane, 109 S. Ct. 1060 (1989).

The Fifth Circuit also divided sharply over the question whether Caldwell deserves retroactive application because it qualifies under Teague as a case involving "bedrock procedural elements" of "fundamental fairness." The majority's refusal to treat Caldwell rights as "bedrock" elements of procedural fairness in death penalty cases should be reviewed because no Supreme Court decision has addressed the question involved here: When does an Eighth Amendment sentencing right involve a procedure "without which the likelihood of an accurate" death sentence "is seriously diminished" under Teague? The Fifth Circuit majority expressed a need for guidance on this question, and all federal courts are in immediate need of guidance, because almost all Eighth Amendment rights established since 1972 need to be assigned a retroactivity status as soon as possible. Of all the cases that may raise this question,

Sawyer deserves this Court's review because the Fifth Circuit majority construes Teague so narrowly as to make it unlikely that any Eighth Amendment rights will be held to be "bedrock" rights.

Finally, this Court should review Robert Sawyer's case because the Fifth Circuit's interpretation of Caldwell is based on the misapprehension that it does not derive from the Eighth Amendment cases of Woodson v. North Carolina, 428 U.S. 280 (1976), Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), as expressly stated in the Caldwell opinion. This misapprehension explains the Fifth Circuit's failure accurately to apply the "new" law analysis of Penry, as well as its failure to recognize the "bedrock" nature of Caldwell rights. While Caldwell violations are rare, they must be treated as cause for new sentencing hearings because they pose a unique threat to the reliability and public legitimacy of death verdicts. This Court is committed to the view that no prosecutor can tell a jury that it can impose a death sentence because an appellate court will "correct any 'mistake' the jury might make in a choice of sentence." Caldwell, 472 U.S. at 343, 348 (Rehnquist, J., dissenting). The Fifth Circuit's failure to appreciate the origin and scope of Caldwell rights justifies this Court's review of the majority's standards governing the assessment of Caldwell claims on the merits.

A. THIS COURT SHOULD REVIEW THE FIFTH CIRCUIT'S DEFINITION OF "NEW" EIGHTH AMENDMENT RULES BECAUSE IT DOES NOT ACCORD WITH THE GUIDELINES FOR "NEW" RULE ANALYSIS ESTABLISHED IN PENRY v. LYNAUGH AND TEAGUE v. LANE.

The Fifth Circuit majority's opinion reveals three missteps that produce its flawed interpretation of "new" law analysis under Penry and Teague, which leads it to find Caldwell to be non-retroactive. Its first error is to elevate the earlier Teague plurality opinion over the later Penry majority opinion as the most relevant guide to retroactivity doctrine, despite the fact that both cases say that "new" law is created when the Court imposes new obligations on the states,

breaks new ground, or reaches decisions not dictated by precedents. Sawyer, slip op. at 5545 (A-18). The Fifth Circuit majority finds that Penry "left the definition of a 'new rule' in some doubt," and that the "opinions in Teague and Penry do not immediately yield a clearly articulable definition of a 'new rule.'" Sawyer, id. The majority's uncertainty finds its source in Justice Scalia's dissent in Penry, which proves "significant" for determining that Penry's application of "Teague's 'new rule' formula may well have turned upon facts" unique to Penry's claims. Sawyer, id. Thus, even though Penry provides the more detailed blueprint for "new" law analysis, the Fifth Circuit determines that it constitutes merely a "special case, one simply reapplying" an earlier case "to a unique development in state law." Sawyer, slip op. at 5548 (A-21). Thus, Penry provides no guidance for resolving the question of Caldwell's retroactivity.

Supreme Court review is needed when a circuit court rejects the applicability of a Supreme Court majority opinion because a dissent suggests that it is inconsistent with an earlier plurality opinion. As the Sawyer majority puts it, once a circuit court perceives such a conflict between Teague and Penry, whether justifiably or not, "only Teague's authors can tell us if they meant what they said or if they have changed their minds." Sawyer, slip op. at 5554 (A-27). Five members of the Fifth Circuit perceive the majority's decision to minimize the significance of Penry differently:

> [T]he majority's dispute is not, in reality, with our interpretation of Teague, but with Penry's elaboration of the 'new rule' standard . . . . [T]he majority ignores the fact that Teague's authors have already spoken in Penry and have effectively rejected any definition of a 'new rule' that would sweep broadly enough to encompass Caldwell. (emphasis in original)

Sawyer, slip op. at 5559-5560 (A-32-33) (King, J., dissenting). Supreme Court resolution of this dispute between the two sides of the Fifth Circuit is important, because the retroactivity of almost all Eighth Amendment rights in this Circuit now depends upon it.

The Fifth Circuit majority's decision to treat Penry as a case that provides no general guidance about retroactivity leads it to make a second misstep. It fails to note that Penry directs lower courts to examine if and how "well-established principles" in Supreme Court cases evolve towards the ultimate development of the rule in question, here the Caldwell ban on false and misleading prosecutorial argument about jury responsibility for death verdicts. See Penry, 109 S. Ct. at 2944, 2944-2947. According to the text of the Caldwell opinion itself, this Court applied specific principles from earlier cases to the problem of the unique kind of prosecutorial argument that seeks to minimize a jury's awesome responsibility for death. Those "root" cases include Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1978), Gardner v. Florida, 430 U.S. 349 (1977), Woodson v. North Carolina, 428 U.S. 280 (1976), and McGautha v. California, 402 U.S. 183 (1971). Compare Sawyer, slip op. at 5549-5550 (A-22-23) (mischaracterizing petitioner's arguments that Caldwell is old law by omitting mention of his argument that Caldwell's rule is derived from earlier cases) with Petitioner's Original Circuit Brief at 36, Petitioner's Original Circuit Reply Brief at 12, Petitioner's Supplemental Circuit Brief at 15-19, Petitioner's Supplemental Circuit Reply Brief at 3-7. For citations to earlier "root" cases in Caldwell, see 472 U.S. at 323, 329, 329 n.2, 330, 333, 340, and see id.. at 341, 343 (O'Connor, J., concurring).

If the Fifth Circuit majority had looked to the Penry opinion, it would have discovered a strong resemblance between the evolution of specific principles that culminated in the Penry rule, and that which culminated in Caldwell. The Woodson principle that reliable death verdicts require consideration of individualized mitigating circumstances led to Lockett's principle that a jury may not be barred from considering such circumstances by statute, and on to Eddings' principle that such a bar may not be erected through the decision or instruction of a trial judge. See Penry, 109 S. Ct. at 2946. Under Eddings, if no judge could tell the jury that mitigating circumstances could be ignored, then surely no prosecutor could do

so either. Under Penry no "new" law is created when the Woodson-Lockett-Eddings principles are applied to hold that the affirmative obligation to remove bars to mitigating circumstances encompasses the obligation to create methods such as jury instructions to permit juries to "give effect" to such evidence. See Penry, 109 S. Ct. at 2945-2947. Under Caldwell, no "new" law was made when prosecutors were condemned for making false and misleading arguments about the non-finality of a jury's death verdict because those arguments create the danger that the jury will not exercise its duty to give full consideration to mitigating circumstances in making individualized decisions about death. See Caldwell, 472 U.S. at 330-333. Cf. Sawyer, slip op. at 5557-5559 (A-30-32) (where dissent describes Caldwell's roots in these Woodson-Lockett-Eddings principles, as well as in other supporting principles).

By ignoring Penry's model for measuring whether "well-established constitutional principle[s]" are being applied "to govern a case which is closely analogous to those which have been previously considered," the Fifth Circuit majority is able to overlook all Eighth Amendment cases between 1974 and 1985 that supply the roots of Caldwell. Penry, 109 S. Ct. at 2944. Instead, the court reaches back to a 1974 case establishing a modest level of federal court scrutiny of ordinary prosecutorial misconduct in state criminal cases. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Donnelly then supplies the majority's only case law authority for finding Caldwell to be a "new" rule. But the majority poses the wrong question when it asks, "whether the changes [from Donnelly to Caldwell] suffice to make Caldwell a new rule . . . ?" Sawyer, slip op. at 5549 (A-22). See also id. at 5537 (A-10) (stating the wrong proposition that "[w]hether Caldwell is a new rule" depends "upon the relation between Caldwell and Donnelly"). According to Penry, the proper question is whether Caldwell's rule evolved from principles established in closely analogous Eighth Amendment decisions rendered during the last two decades. If the Fifth Circuit majority's "new" law reasoning is adopted, then any Eighth Amendment ruling like Caldwell can be

found to be "new" law through the simple expedient of finding a non-Eighth-Amendment case from an earlier era, and noticing how new a given Eighth Amendment case is by comparison to that earlier case. Neither Teague nor Penry support such an approach to "new" law analysis.

Finally, the third misstep of the Fifth Circuit majority occurs when it reads Teague as requiring the adoption of a radically new element in "new" law analysis. First, the majority reads Teague as rejecting the idea that a uniform body of state court practices and constitutional holdings should be considered when deciding whether a Supreme Court rule that ratifies these holdings is "old" law. See Sawyer, slip op. at 5548-5549 (A-21-22) (finding that Teague's citation, without comment, of Ford v. Wainwright, 477 U.S. 399 (1986), demonstrates that state court anticipation of Caldwell's rule is irrelevant). This proposition is not explicitly established in Teague, and it contradicts the well-established relevance of state court practice to "new" law analysis. Rules that break new ground include not only those that overrule earlier cases, but also those that do not ratify a strong state consensus supporting a particular interpretation of well-established principles. See, e.g., Solem v. Stumes, 465 U.S. 638, 647-64 (1984). In the case of Caldwell's rule, both the "fair trial" state court decisions between 1877 and the present, and the Eighth Amendment state court decisions in the post-Furman era, provide overwhelming evidence that state courts endorsed a ban on false and misleading prosecutorial argument about the non-finality of a sentencing jury's role. Furman v. Georgia, 408 U.S. 238 (1972). See cases cited in Petitioner's Supplemental Circuit Brief at 10-12; see cases cited in Caldwell, 472 U.S. at 334 n.4-5. Compare Sawyer, slip op. at 5549 (A-22) (asserting that all post-Furman state cases adopting Caldwell rules in the pre-Caldwell era are based solely on "state law" that could not create "federal jurisdiction") with id., slip op. at 5560-5562 (A-33-35) (where dissent notes that such cases are based on state court readings of their obligations under Gregg v. Georgia, 428 U.S. 153 (1976)). See also La. Code Crim. P., Art. 905.9 and La. Supreme Court Rule 28.

As Penry and Teague make clear, the chief concerns of retroactivity doctrine are making sure that states are not unfairly burdened with obligations they cannot reasonably anticipate, and creating an incentive for state courts "to conduct their proceedings in a manner consistent with established constitutional principles." Teague, 109 S. Ct. at 1073. See Penry, 109 S. Ct. at 2947-2949 (describing how states may be asked to fulfill general Eighth Amendment obligations imposed upon them in specific terms that are supported by well-established principles). The Fifth Circuit concludes that "a rule is new for purposes of Teague if it has not been accepted at the time the petitioner's conviction became final." Sawyer, slip op. at 5550 (A-23). This ruling creates such a broad definition of "new" law that it fails to provide incentives for state courts to read this Court's Eighth Amendment opinions with attention to the principles they contain.

Given the Fifth Circuit majority's admitted uncertainty about the validity of its interpretation of Teague and Penry, this Court should review Robert Sawyer's case in order to clarify the "new" law standards for this circuit and for others. Disagreements about the meaning of these standards are arising already in other circuits. See Moore v. Zant, No. 84-8423 (11th Cir. Sept. 28, 1989) (en banc) 1989 WL 112653. Death row defendants in other circuits continue to enjoy the benefits of receiving resolutions of Caldwell claims on the merits, while Robert Sawyer has been barred from relief. See Buttrum v. Black, ___ F. Supp. ___ (N.D. Ga. Sept. 28, 1989) 1989 WL 108092 (granting Caldwell relief). See also Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989), vacated for rehearing en banc, March 23, 1989, argued May 9, 1989 (considering question whether Caldwell should be given retroactive effect under Teague and Penry). This Court's pending decision in Butler v. McKellar should provide some guidance on the concepts of "new" and "old" law. See Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988), cert. granted, sub nom. Butler v. McKellar 109 S. Ct. 1952 (1989) (certiorari granted to determine whether Arizona v. Roberson, 108 S. Ct. 2093 (1988) is "new" law).

But the Fifth Circuit majority's decision in Sawyer still deserves this Court's review because its exclusion of Caldwell rights from the category of "bedrock" procedural elements under Teague is a ruling that should receive reconsideration in its own right.

B. WHEN CALDWELL RIGHTS ARE VIOLATED, THE LIKELIHOOD OF AN ACCURATE DEATH SENTENCE IS SERIOUSLY DIMINISHED UNDER TEAGUE v. LANE. THEREFORE THIS COURT SHOULD REVIEW THE FIFTH CIRCUIT'S REFUSAL TO TREAT CALDWELL v. MISSISSIPPI AS A DECISION INVOLVING A "FUNDAMENTAL FAIRNESS" RIGHT ENTITLED TO RETROACTIVE EFFECT UNDER TEAGUE.

In Sawyer the Fifth Circuit majority attempts to create a standard to answer the question that was not answered in either Penry or Teague: When does an Eighth Amendment sentencing right qualify under the "fundamental fairness" exception to Teague's non-retroactivity rule, because it involves a procedure "without which the likelihood of an accurate" verdict "is seriously diminished"? See Teague, 109 S. Ct. at 1077. The majority decides to treat as "fundamental" only those rights that:

> either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's Caldwell claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second Teague proviso.

Sawyer, slip op. at 5553 (A-26).

There are two reasons that this definition of retroactive "fundamental fairness" rights under Teague deserves review by this Court. First, the Fifth Circuit majority indicates that it is uncertain about the propriety of this definition, and that it welcomes this Court's guidance. While the majority finds that "pending further direction from the Supreme Court . . . we must follow the course set by the [Teague] plurality as best we can," it also notes that "it is not clear how Caldwell, with its condemnation of a particular type of jury

argument, fits into the Teague scheme." Sawyer, slip op. at 5550, 5551 (A-23-24). Additionally the majority notes the difficulties in translating Teague's exception, which is couched in the language of rules that diminish the "likelihood of an accurate conviction," into the death verdict context. "Our task is made difficult by the newness of the amalgam [of applying Teague to death verdicts] as well as its uncertain precedential footing." Sawyer, slip op. at 5551 (A-24). Nonetheless, the majority concludes that a fair translation can be accomplished by requiring habeas petitioners to show that the relevant procedure is one "without which the correctness of the jury's decision to punish by death rather than by life imprisonment is seriously diminished." Id.

It is vital for this Court to address the meaning of Teague's concept of "fundamental fairness" in the death sentencing context, because almost all Eighth Amendment rights established since 1972 need to be assigned a retroactivity status under Teague as soon as possible. See List of Death Penalty Cases Since Witherspoon v. Illinois, 391 U.S. 510 (1968) (A-144). Assuming that the Sawyer majority has performed a reasonable translation of Teague's conviction-based definition into the death penalty context, it remains important for this Court to review the Fifth Circuit's translation of Teague, out of all the cases that will raise the "fundamental fairness" question in the coming months. This is because the Fifth Circuit majority created a further translation of Teague to require an Eighth Amendment procedural right to have an "overwhelming influence" upon the accuracy of a death verdict, instead of the more moderate Teague requirement that accuracy be "seriously diminished" by the violation of the right. Sawyer, slip op. at 5553 (A-26).

While appropriate definitions of "fundamental fairness" rights may exist on a spectrum, the Fifth Circuit's definition is certainly at one end of that spectrum. This makes it difficult for any court using that definition to remain flexible, and to make case-by-case determinations of the qualities of particular Eighth Amendment

rights. In addition, the Fifth Circuit's definition retains a focus on "factual innocence" that has no evident bearing upon Eighth Amendment sentencing hearing rights like Caldwell. It also appears to suggest that some defendants' Caldwell claims may qualify for retroactive application while claims of other defendants do not. This result clearly contradicts Teague's description of "fundamental fairness" analysis. See Sawyer, slip op. at 5565 (A-38) (dissent noting that "[u]nder Teague, we must address the nature of Caldwell error, not the specific facts of Sawyer's case"). Unless this Court reviews the Fifth Circuit's special version of Teague's non-retroactivity exception, very few Eighth Amendment rights, if any, can be expected to receive retroactive treatment in future Fifth Circuit cases.

The second reason that this Court should review the Fifth Circuit's Teague interpretation is that it is not only extreme, it is wrong, as applied to Caldwell. Both the text of the Caldwell opinion, and that of the Teague opinion as well, reveal that Caldwell fits comfortably within the parameters of rights that "seriously diminish" the accuracy of death verdicts. The Caldwell Court repeatedly emphasized the dangers of unreliability posed by uncorrected arguments that suggest in false and misleading ways that the jury is not the ultimate arbiter of death. See Caldwell, 472 U.S. at 329-333, 340-341; see id. at 341, 342, 343 (O'Connor, J., concurring). The Teague plurality notes that "bedrock" procedural elements deserving retroactive application will usually include elements that have already "emerged," and Caldwell's fundamental nature emerged and was recognized in many states between 1877 and 1985. See Teague, 109 S. Ct. at 1077; see Petitioner's Supplemental Circuit Brief at 6-29. Moreover, if the Teague plurality regards a rule as "bedrock" that prohibits the prosecutor from knowingly making use of perjured testimony, then it should regard Caldwell's ban on knowingly making use of false and misleading arguments about the non-finality of a jury's death verdict as "bedrock" as well. See Teague, 109 S. Ct. at 1077.

Instead of relying on the Caldwell and Teague opinions, the Fifth Circuit majority relies for its Teague interpretation almost exclusively on Dugger v. Adams. See Sawyer, slip op. at 5552-5553 (A-25-26), citing Adams, 109 S. Ct. 1211 (1989). Yet the Adams Court simply refused to create a per se exception for Caldwell claims to the rule that procedural default will bar habeas relief, and insisted instead that the "fundamental miscarriage of justice" exception to procedural defaults should be applied on a case-by-case basis. See Adams, 109 S. Ct. at 1217-1218 n.6. Procedural default doctrines cannot be used to provide the substance for answers to retroactivity questions because the two fields are animated by different concerns. Procedural default doctrines must be written so as to create strong incentives for counsel to raise objections to all errors in state court. Retroactivity doctrines focus instead upon the expectations of the state courts themselves concerning the constitutional standards that will be applied to them. Where state courts can reasonably anticipate that well-established principles will be used to create "old" law like Caldwell, or that "bedrock" rights like Caldwell will be endorsed by the Supreme Court, then state courts can live with the prospect of retroactive application of Caldwell rights.

The Fifth Circuit's interpretation of Teague, both regarding its "new" law analysis and its "fundamental fairness" exception, is distorted because of the majority's assumption that Caldwell derives from Donnelly rather than from its Eighth Amendment predecessors. The majority's interpretation of Caldwell deserves this Court's review not only because of the problems it creates for retroactivity doctrine, but also because it misconstrues the scope and meaning of this Court's holding in Caldwell itself.

C. ROBERT SAWYER'S PROSECUTOR VIOLATED CALDWELL v. MISSISSIPPI, AND THIS COURT SHOULD REVIEW THIS EIGHTH AMENDMENT CLAIM ON THE MERITS BECAUSE THE FIFTH CIRCUIT'S STANDARDS FOR SUCH CLAIMS DO NOT ACCORD WITH THOSE OF THE CALDWELL DECISION.

It is rare for a prosecutor to commit Caldwell error, and rare

for a defendant to be able to satisfy this Court's burden of proof for such an error. In order to receive a new sentencing hearing, a defendant must show that the prosecutor's statements: a) were focused on the subject of the non-finality of the jury's decision; b) were false and misleading; c) were focused, unambiguous and strong; and d) were uncorrected by the trial judge. See Caldwell, 472 U.S. at 320, 340 & n.7; see id. at 341, 342, 343 (O'Connor, J., concurring). Thus it is not surprising that in over a dozen Caldwell cases decided by the Fifth Circuit since 1985, only one defendant was granted a new sentencing hearing on the basis of a Caldwell violation. See Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986). The five Fifth Circuit dissenters in Sawyer concluded that the prosecutor's violation of Caldwell in this case is clear. Sawyer, slip op. at 5555-5556 (A-28-29). The dissenters also note that if Robert Sawyer's case had been decided without regard to this Court's recent retroactivity cases, "the majority opinion would have granted him a new sentencing hearing." Id. at 5567 (A-40). The justifications for such conclusions are apparent from the record of the prosecutor's argument.

In four separate episodes in closing argument, the prosecutor informed the jurors that their job was merely to make a "recommendation," or to take an "initial step" that many courts would review, and that the jurors should not "feel like you are the one" making the death penalty decision. See Trial Tr. at 982-989 (A-45-52); Sawyer, slip op. at 5531-5532 & 5532 n.3 (A-4-5); id. at 5555-5556 (A-28-29) (King, J., dissenting). This prosecutor's argument was even worse than the one in Caldwell, where the prosecutor focused on "reviewability" alone. See Caldwell, 472 U.S. at 325-326. Here the prosecutor focused on the power of appellate courts both to review and to correct the jurors' death verdict, telling them:

> That is not so [that you are pulling the switch]. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong . . . .

(Trial Tr. at 985, A-48.) These remarks were preceded by earlier

episodes of argument that made it clear just who the "others" were who would correct the jury's death verdict, namely the appellate courts. As Judge King noted in her dissent from the panel opinion:

> [T]he prosecutor here made several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. . . . . The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination.

Sawyer, 848 F.2d at 599, 605. Cf. Caldwell at 472 U.S. at 343, 348 (Rehnquist, J., dissenting) (if the prosecutor argues to a jury that "the appellate court would correct any 'mistake' the jury might make in choice of sentence" and if the trial judge does not correct such an argument, "I might well agree [that this does not comport with] some constitutional norm related to procedural fairness").

After applying Caldwell retroactively to Robert Sawyer's case, this Court should find that an Eighth Amendment violation was committed by Robert Sawyer's prosecutor. In doing so, this Court should not rely on the Fifth Circuit majority's standards for Caldwell violations, but on its own rules expressed in the Caldwell opinion. For while some portions of the Fifth Circuit majority's opinion adhere to this Court's standards, other portions do not. Two examples are illustrative. First, the Caldwell Court made clear that a trial court's "correction" could not be found to have occurred fortuitously through the utterance of some boilerplate references to the jury's role, appearing in part of the jury instructions that are unconnected to the prosecutor's improper arguments about non-finality. See Caldwell, 472 U.S. at 340 n.7 (describing how general statements by the trial judge or prosecutor about juror responsibility cannot be treated as adequate "correction" because they do not retract or even undermine the erroneous assertions that the jury's verdict "would be reviewed by the appellate court to determine its correctness"). As Justice O'Connor put it, correcting statements must "correct the impression that the appellate court would be free to reverse the death sentence

if it disagreed with the jury's conclusion that death was appropriate." Caldwell, 472 U.S. at 341, 343 (O'Connor, J., concurring). Compare Sawyer, slip op. at 5544 (A-17), (noting erroneously that boilerplate instructions about the "judge [being] the sole source of the law" or the "lawyers' arguments [not being] evidence" are relevant to determining Caldwell error) with Caldwell, 472 U.S. at 343, 344, 345, 346, 349 (Rehnquist, J., dissenting) (revealing that the Caldwell Court ignored a variety of general statements about responsibility made by the judge, prosecutor, and defense counsel, including statements that the jurors were the sole judges of the facts, and the lawyers' arguments were not evidence).

A second example of the Fifth Circuit majority's use of a standard that is inconsistent with Caldwell is its statement that Caldwell views prosecutorial argument as a basis for reversal "if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding." Sawyer, slip op. at 5553 (A-26). This standard is similar to the Caldwell dissent's approach, which argued that bad prosecutorial argument could be regarded as harmless in light of a reading of the transcript of the entire trial. See Caldwell, 472 U.S. at 343, 343-352 (Rehnquist, J., dissenting). While this standard is the appropriate one for assessing ordinary prosecutorial misconduct, this Court expressly rejected this approach in Caldwell. See also Darden v. Wainwright, 477 U.S. 168, 183-184 n.15 (1986) (reaffirming that Caldwell standards are different from Donnelly-Darden standards because Caldwell addresses the unique harm that occurs when a jury is misled "into thinking that it [has] a reduced role in the sentencing process").

Thus, if this Court should decide to review Robert Sawyer's case, it should review not only the question whether Caldwell is retroactive, but also review the question whether there was a Caldwell violation on the merits. If this Court decides to give retroactive effect to Caldwell, it should also find, as the Fifth Circuit

dissenters did, that Robert Sawyer's Eighth Amendment rights were violated by the prosecutor's argument here. While Caldwell error is rare, a prosecutor occasionally will be tempted deliberately to commit errors such as Caldwell violations, even in a case he or she expects to win. See Jonakait, The Ethical Prosecutor's Misconduct, 23 Crim. L. Bull. 550 (1987). See also State v. Lindsey, 404 So.2d 466, 481-488 (La. 1981) (where Robert Sawyer's prosecutor was condemned for remarks that were held to be reversible misconduct). Caldwell violations must be condemned when they occur, because they pose a unique threat to the reliability and public legitimacy of death penalty verdicts. Robert Sawyer should be given a new sentencing hearing so that the decision whether he should die will be put to a jury that is not misled about its responsibilities.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 13, 1989

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER, *Petitioner*,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary, *Respondent*.

CERTIFICATE OF SERVICE

I, Catherine Hancock, a member of the Bar of this Court, hereby certify that on this 13th day of November, 1989, a copy of the corrected Petition for a Writ of Certiorari in the above-entitled case (the original Petition having been filed and docketed on October 16, 1989) was mailed, first-class postage prepaid, to William J. Guste, Attorney General of Louisiana, State Capitol Station, P.O. Box 44005, Baton Rouge, Louisiana 70804, and to Ms. Dorothy Pendergast, Office of the District Attorney, 24th Judicial District Court, New Courthouse Building, Gretna, Louisiana 70054, counsel for the respondent herein. I further certify that all parties required to be served have been served.

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